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ABSTRACT

This paper addresses the future role of the Ford Foundation in helping to improve society's capacity to resolve conflicts. Part I discusses the problem. In recent years America has had many sorts of conflicts and disputes. Examples are racial equality, energy allocation, environmental protection, consumer rights, and equal educational opportunity. Conflicts over these matters arise among interest groups, between interest groups and government, between levels of government, and between individuals. These conflicts are often very difficult to resolve because of the growing complexity, technological sophistication, and interdependence of society's problems. Part II examines current responses to the problem. The judicial process, the process used by administrative agencies, alternative third party intervention, and systematic reform are discussed. In part III promising alternatives are presented. These include strengthening the capacity of existing courts and agencies and alternatives outside the formal system such as arbitration, conciliation, and private initiatives. The publication concludes with a description in part IV of a Ford Foundation program to resolve conflicts. It is a systematic approach that expands our understanding of the larger issues in conflict resolution and takes account of the links between problems in different segments of the adjudicative and administrative processes. (Author/RM)

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New Approaches to

Conflict Resolution

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Foreword

America in recent years has been swarming with conflicts and disputes of all sorts. The issues range across the entire social spectrum—for example, racial equality, energy allocation, environmental protection, consumer rights, and equal educational opportunity. Conflicts over these matters arise among interest groups, between interest groups and government, between levels of government, and between individuals. The courts, administrative agencies, and other decision-making bodies have had great difficulty in attempting to resolve such large numbers of conflicts efficiently and fairly. And the quantitative problem is compounded by the growing complexity, technological sophistication, and interdependence of society's problems.

The time seems ripe, therefore, for careful testing of both existing and alternative procedures for conflict resolution. Can such processes be made more flexible so that many kinds of problems can be handled efficiently and equitably? What is the effect of increasing public participation? What role can a private foundation play in the improvement of society's capacity to deal with all kinds of conflicts so that unnecessary ones are avoided, while inevitable ones are resolved efficiently and fairly?

Until recently there has been little institutional support for conflict resolution. In the last few years the Ford Foundation has given several grants to projects involving third-party approaches to conflict resolution.* Now the

*See *Mediating Social Conflict* (New York: Ford Foundation, 1978), available on request.

Foundation plans to embark on a broader-based program of conflict resolution, with three general objectives:

—strengthening the capacity of existing formal institutions;

—finding better ways of handling disputes outside of the formal system;

—identifying specific or general reforms that may help to avoid conflicts or to simplify them.

To work toward these objectives we shall be considering a wide variety of experiments and research proposals and supporting a number of them. Such work may help to explain why some societies have less difficulty in resolving conflicts than others and why some have more difficulty at one time than at another.

This paper is adapted from one prepared by Sanford M. Jaffe, officer in charge of the Foundation's Government and Law program and presented to the Foundation's Board of Trustees in September, 1977. We publish it in part to explain the background of our enlarged program and in part as a contribution to the understanding of a broad, varied, and important topic.

McGeorge Bundy

I
The Problem

This paper addresses the question of what role the Foundation can play in helping to improve society's capacity to manage conflicts and to improve regulation—to avoid conflicts where possible, to resolve efficiently and fairly those that do arise and to facilitate the hearing of legitimate grievances. Part I defines the area of concern. Parts II and III describe the nature of the demands faced by existing institutions and some efforts now going on, or suggested, to meet them. Part IV outlines a Foundation program authorized by the Board of Trustees over the next two years.

Existing institutions for resolving conflicts are being sorely tested. Inflation, unemployment, and increasing concern about the limits of resources have been added to the issues that came to prominence in the sixties—poverty, race, equal education, consumer and environmental protection.

As choices have to be made, disputes are bound to increase in number and intensity. At the same time there seems to be dissatisfaction with the way conflicts of all types are handled and growing doubts concerning the capacity of present institutions to deal with the demands placed upon them. Part of the problem is the recent increase in the workload of the judiciary. Between 1960 and 1975, the number of cases filed in federal courts rose by 80 per cent. In the last four years alone, the overall growth rate was 25 per cent, and in 1975 case filings grew by 13 per cent. Figures are not readily available for state

courts, but the evidence suggests that the situation there is at least as acute as in the federal system.

The striking increase in the use of courts to settle disputes at state and federal levels is not the only sign of current social pressure. There has also been a substantial increase in the number and workload of administrative agencies. Of more than 70 federal regulatory agencies now in existence, 50 have been created since 1960. The Social Security Administration alone employs more than 600 full time administrative law judges who now hear more than 150,000 cases a year. The rate of administrative growth at the state and local levels has also been rapid. As states have assumed a wider role in environmental and consumer protection and expanded their participation in social programs, they have become involved in a sharply rising number of disputes.

The management of this increase in conflicts has become a massive national problem. Failure to resolve it could seriously harm the way in which Americans view their system of law and justice. The question is, how to deal with it? Some believe that far less regulation would be preferable to the present system. Others say there is too much reliance on the adversary process, while still others see that process as the way to highlight significant issues. Some are concerned that efforts to reduce conflicts or to handle them more efficiently will have the effect of reducing access to the system of justice that the poor, minorities, and other disadvantaged and unrepresented people have so recently won. This concern emphasizes the importance of fairness along with efficiency.

There is no obvious way to strike an appropriate balance between equity and efficiency. Moreover, efforts to broaden access to the courts may increase the load on the system. What is clear is that there is a gap between the

level, magnitude, and types of conflicts raised in this society and the ability of its institutions to deal with them.

Four principal types of conflict may be noted.

Complex Public Policy Disputes

Complex public policy disputes arise out of government regulation of the economic and social systems. Regulation of economic activity is pervasive and has grown considerably in the last two decades. It involves major decisions about the distribution of goods and services.

Social policy disputes especially arise when government pursues broad national objectives that may involve or impinge on many interests and groups, such as racial equality and economic opportunity, environmental protection, income security, and public health and safety. Examples of agencies with such objectives are the Occupational Safety and Health Administration, the Equal Employment Opportunity Commission, and the Environmental Protection Agency. Indeed all large social welfare programs—cash transfers, food stamps, housing, health, and education—generate similar complex public policy disputes.

Regulatory disputes frequently involve difficult technical questions. Sound decision-making requires access to highly specialized bodies of scientific or technical data. Social policy disputes raise difficult political and value questions. In both kinds of disputes information about key variables is often incomplete or inaccurate, effects of alternative choices are hard to gauge, and often there are no easy answers to cost-benefit questions or questions of trade-offs among various interests.

Most disputes involve many parties and several decision-making bodies. There are frequent complaints about

overlapping, about inconsistent decisions by different agencies and programs, and about inadequacies in the machinery for resolving these jurisdictional disputes fairly and efficiently.

Regulatory Disputes

While regulatory bodies resolve major policy issues, they also process large numbers of routine disputes. For example, the Civil Aeronautics Board (CAB), in addition to allocating airline routes (large, complex disputes), will in a given year also handle several thousand passenger and shipper complaints, tariff applications, and referrals. The Securities and Exchange Commission (SEC), in addition to about 100 formal hearings per year, will also rule on several thousand registration statements. During Fiscal Year 1976, the Equal Employment Opportunities Commission (EEOC), received 97,674 complaints, resolved 82,537, and had a backlog of 122,000 cases.

There are differences of degree among the kinds of conflicts that arise in the normal regulatory process and the more complex disputes. The routine disputes involve fewer parties, the range of choice is narrower, the implications of alternative decisions are less dramatic, and fewer decision-making bodies are involved. Still, the high volume of such disputes presents serious management problems and consumes substantial energies and resources. At both the federal and state levels, agency dockets are clogged, resulting in inordinate delays in the processing of licenses and permits and in the administration of social programs. The sheer volume of the work that does get done means that even though each decision has limited impact, the overall effect can be great. Moreover, these disputes sometimes contain the germs of more complex issues. For

example, a seemingly routine license renewal or tariff application may uncover underlying issues that challenge traditional methods of doing business. Additional parties may intervene, and what seemed like a routine case may suddenly develop into a difficult controversy.

Disputes Arising Out of Social Welfare Programs

In agencies that distribute benefits, such as the program of Aid to Families with Dependent Children (AFDC), food stamps, aid to the disabled, and Medicaid, there are disputes about the appropriate form of benefits, conflicting and inconsistent eligibility rules on employment and training incentives, and disputes about how administrators should deal with beneficiaries. The conflicts created by the many programs and overlapping jurisdictions in setting standards and sound management procedures lead to errors, inefficiencies, and other problems of enforcement. Also in this category are disputes between individuals and institutions, such as schools, hospitals, clinics, and mental and correctional institutions.

Dispute settlement procedures in social welfare activity should be looked at with special care to ensure that they are fair and responsive, since the people involved are among the most disadvantaged and hard-pressed. But here again the need for efficiency and sound administration makes it difficult to strike a balance.

Individual Disputes

Even though most controversies between individuals never come to the attention of a public agency, the handling of interpersonal differences is a traditional func-

tion of organized society. For those individuals whose disagreements do come before a public agency, the experience is the most intimate they will have had with government, and the manner in which the dispute is handled is likely to have a marked effect on their attitudes toward government.

Observers and practitioners agree that the present system of handling individual disputes is too costly, cumbersome, and time consuming. Some argue that dispute-settling arrangements between people and institutions are badly organized and produce unnecessary further conflicts. Accident compensation systems that continue to rely on determining fault are cited as examples. In other situations, dispute-settling institutions are not functioning properly, either because of insufficient resources or because their original purpose has been distorted: for example, small claims courts primarily function as collection agencies for large creditors, and many individual consumers see them as inefficient and unfair.

II
Current Responses

A common theme running through a number of approaches discussed in this paper is lack of confidence in formal adjudication for settling many kinds of disputes. Some proposals seek alternatives that will eliminate the delay, cost, and disruption caused to on-going human relations by the adjudicative model. Others are based on the view that since current adjudicatory processes do not adequately resolve certain matters, it is necessary to create procedures that will do so.

The Judicial Process

In recent decades, as government regulation has become more complex and pervasive, and as public policy questions have turned increasingly on legal and constitutional issues, the judiciary has had to deal with new kinds of subjects. For example, with the growth of environmental regulation, courts have been called on not only to interpret general environmental policy statutes, but also to review complicated environmental impact statements and highly technical pollution-control legislation. They have also been asked to correct deficiencies in welfare systems, to assist broadcast audience groups trying to secure the reallocation of media resources, and to supervise the operation of schools, mental hospitals, and prisons.

This new scope of judicial responsibility accounts for some of the growing pressure on the judiciary and the increased workload burdening the courts. Pressure also

arises from the growth in population and transactions, and from changes in technology, the economy, and in social patterns. Furthermore, there has been an expansion in individual rights and in access to the courts by underrepresented groups and individuals.

Some commentators see expanding judicial involvement in social policy as an undesirable shift in judicial function. They argue that judges are taking on tasks beyond the capacity of the judicial system. Others believe that traditional judicial adjudication of public policy matters is necessary regardless of the unprecedented volume of demands on the courts. They hold that such judicial response is the only way for significant minority interests to be heard and protected. The issue, they say, is not *whether* the courts should involve themselves, but rather *how* the courts can handle all their business more efficiently and effectively.

Against this background, the formal adjudicative model is being questioned and new approaches are being explored. For example, conflicts between individuals with continuing relationships pose special difficulties for courts. The adjudicative technique tends to isolate a specific incident leading to a dispute, thus making it difficult to take into account all the dimensions of the controversy. Moreover, the adversary nature of the proceedings and its winner-take-all aspect can exacerbate tension between the parties and leave the underlying problems to fester.*

Adjudication may also be too costly for some kinds of cases. For example, in automotive accidents the adversary

*A recent study by the Vera Institute of Justice in New York City showed that approximately 60 per cent of all felony arrests involve disputes between relatives, friends, and acquaintances and that the overwhelming majority of these arrests were disposed of without going through the complete court process.

system may involve a disproportionate use of resources to decide facts that can be resolved through simpler and faster processes such as no-fault insurance plans, which simplify the issues and replace adjudication by administrative processing of claims.

In the area of complex social policy disputes, some federal courts have used innovative techniques to alter the traditional adversary procedure. For example, Judge Frank Johnson, in the Federal District Court in Alabama, has established human rights committees to supervise the implementation of court orders concerning standards in state mental institutions. In the Detroit school desegregation controversy, Judge Stephen J. Roth appointed a committee of experts to work out details of pupil and faculty reassignment. In Boston, Judge Arthur Garrity invited the Community Relations Service of the Federal Department of Justice to help with the desegregation plan. Other courts have made use of experienced persons to help in fact-finding and mediation.

Another recent approach has been the revived interest in specialized courts that mix both expertise and informal techniques and bypass some of the traditional adjudicative procedures. Examples are the New York Housing Court, which uses lay hearing officers who have considerable discretionary authority; the Boston Housing Court, with housing specialists, informal procedures, rapid action, and a strong tenant orientation; and the Los Angeles Conciliation Court, which uses mediation and discussion to try to prevent marital dissolution, regardless of whether separation has begun. A proposal for a science court that would handle cases requiring special expertise to deal with certain factual and technical issues is being discussed by the National Academy of Science.

Other proposals are aimed at speeding up matters in the

courts and focus on efforts to promote settlements where possible. Economic incentives, which are most developed in England, enable parties to submit binding offers prior to trial. Penalties and incentives are designed to encourage the submission of reasonable figures.*

Court management has also received increasing attention. Institutes like the National Center for State Courts and the Federal Judicial Center are undertaking a number of projects designed to improve the management of the court system by relieving congestion and providing more efficient case resolution.

Administrative Agencies

Administrative agencies are increasingly viewed as a problem rather than as a solution to questions requiring fair and efficient action in the public interest. Economic regulation for consumer protection is under attack from many quarters, for example, and many persons contend that social welfare programs either fail to meet their objectives or do so at a cost that makes them difficult to justify. Some argue that the effort to solve problems through the regulatory mode serves to create conflict rather than reduce it. Some agencies have grown so large and their programs so complex that is is hard to say what they are doing or to control their activity. Almost all observers express concern over the failure of agencies to develop coherent policies and programs and over the vast amount of discretion vested in some agency administrators.

Agencies sometimes must resolve complex technical disputes without clear guidelines from Congress. For ex-

*The English procedure, as well as other plans, are discussed in the third part of this paper.

ample, Congress never specified how much competition there should be in the airline industry. Not only was the problem delegated to the CAB, but it was delegated without any specification of the criteria the agency was to use in deciding whether to certify one or more carriers per route. This situation is not unique. Indeed, it is characteristic of the delegation of power to agencies with substantial authority over large sectors of the economy.

The formal, quasi-adjudicative procedures used by the regulatory agencies are often ill-suited to resolving large and complex disputes. In such matters, the cumbersome operation of the procedures may result in extensive delays. The strain has been increased in recent years, since some agencies traditionally engaged in economic regulation are now being asked to consider environmental claims as well. And the tendency is a rise in the number of competing claims. Witness the pressure to file "inflationary impact" statements in the case of safety regulations. In any case, it is not at all clear that a rate proceeding, for example, is the appropriate vehicle for effective consideration of such factors.

Another criticism of agencies is that their traditional procedures tend to discourage consensual solutions. When agencies grant licenses, set rates, or determine the safety of drugs, they often allow the parties to the proceeding to have a full adversary hearing with impartial decision-makers, formal records, and rights of cross-examination and appeal. This leads the parties to approach the agency as if they were in a lawsuit. Decrying this tendency, former Secretary of Labor John Dunlop observed:

> The regulatory process encourages conflict, rather than acting to reconcile opposing interests. Moreover, there is a sense that it is wrong for the regulatory agency to try to bring parties together and develop consensus. Relying on public and highly formal

proceedings makes the development of consensus extremely difficult, if not impossible.

Agencies have also been accused of becoming captives of industries they regulate. The recent report on Federal Regulation and Regulatory Reform by the Oversight Subcommittee of the House Interstate and Foreign Commerce Committee, which studied nine agencies, pointed out that they were ineffective, overly responsive to special interests, and inadequately accountable to broad public interests.

The processing of large volumes of regulatory disputes points up other problems. Since agencies like the Food and Drug Administration, the Interstate Commerce Commission, and the Federal Communications Commission process thousands of decisions a year, it becomes more and more difficult to monitor administrative decision-making. Prior to the advent of public interest law, the FCC rarely conducted inquiries into license renewals. Such applications were routinely approved, which raised questions of fairness and standards for the exercise of discretion.

One frequent suggestion for curing the maladies of the administrative process is deregulation, i.e. greater reliance on market forces to improve the quality and lower the price of goods and services. Plainly, where market forces would more effectively protect the interests of the public than government regulation, deregulation seems sensible. But much regulation came into being because of dissatisfaction with the market. While new insights may cause us to reconsider this judgement in some cases, substantial areas will continue to require some form of government intervention.

Several federal agencies are experimenting with interesting new procedures. One of these is informal rule-making, a procedure in which general rules are produced following a hearing in which affected parties have had an

opportunity to suggest how the rules should be written. While such rule-making departs from the straight adjudicative model, it does preserve some adversarial (and adjudicative) features required by Congress and the courts. A good example of this approach is the licensing procedure of the Nuclear Regulatory Commission (see page 38).

This kind of informal rule-making, with effective participation by interested parties, also resembles a form of bargaining between the parties and the agency, even though the agency has final authority. The extent to which it is a form of bargaining or negotiation depends of course on the posture of the agency or other governmental body. It can cover a wide spectrum of flexible procedures—from modifications of formal adjudicative procedures to full bargaining by interested parties. The government agency role could vary from that of an active participant exercising final authority to that of a passive ratifier.

Related to informal rule-making is the question of participation: Who is entitled to appear before the agencies and share in the decision-making processes? The theory is that if groups with legitimate interests are brought into the process early, agency decisions are likely to prove more acceptable, or at least less vulnerable to attack in the courts. In the short run, increasing participation may bring to light previously hidden conflicts that will require more time to resolve. But in the long run, it is hoped that fairer procedures will reduce conflict and litigation. This seems to be the experience in Sweden, where group participation in policy-making in the consumer area has tended to reduce conflicts.

In the last few years, there has also been a dramatic increase in conflicts arising out of the work of social welfare agencies. Part of the increase has been due to

decisions of the United States Supreme Court, which either have ordered the enforcement of hearings already provided for by statutes, or have held that the Due Process Clause requires some kind of hearing. In addition to hearings on welfare, the Supreme Court has recently required hearings in school disciplinary cases and before probation and parole can be revoked.

Clients of social welfare agencies have also become more aware of their rights and are pressing claims and demanding hearings. For example, the large increase in the number of formal hearings in the Social Security Administration has caused a great deal of concern in both the agency and Congress about the cost and manageability of such proceedings. In view of the numbers of people involved in social welfare programs, the cost of enforcing full procedural rights could be staggering.

Reform efforts here take two general approaches. One is to minimize conflicts by structuring social welfare systems to improve the accuracy of local operations by: (a) simplifying programs and reducing discretion; and (b) instituting better systems of management and quality control. The other approach is to improve the handling of the conflicts that do arise. There is still a great deal of leeway in fashioning procedural systems to hear client claims, and the challenge is to devise systems based on models other than the rigid adjudicatory model which will have a better chance to achieve fairness and efficiency (see page 41).

Judicial Review

The relationship between the federal judiciary and the administrative process has been a history of ups and downs. During the 1930s and 1940s, there was a protracted struggle over what due process meant when applied to

administrative decision-making. For over twenty years, starting with the enactment of the Administrative Procedure Act (1946) and the subsequent "judicialization" of agency procedures, there was a truce of sorts. The courts did not inquire too closely into administrative discretion as long as agencies followed certain procedures.

During the late 1960s, the relationship became tense again, primarily because the reviewing courts had less confidence in the fairness and completeness of administrative decision-making. The courts expanded "standing"—admitting more interested people to the process—and inquired more closely into procedures. The mood of the federal appellate courts also manifested itself legislatively. Congress and the states enacted legislation expanding access to administrative agencies, with the result that there was a large increase in the number of conflicts that these bodies had to deal with. This development has contributed to the overload of the federal judicial system, not so much in terms of numbers, but rather in the amount of time such cases generally consume.

Cases come to the reviewing courts primarily because of breakdowns in the administrative process. For the most part, court decisions here are procedural—advising agencies, sometimes repeatedly, to go about their business in a fairer manner and to pay serious attention to all affected interests. In technical, complex disputes, courts cannot decide major issues of substantive policy. They will not allocate airline routes, set tariffs, or control the development of satellite communications. In difficult social disputes, courts are not institutionally equipped to continually mediate and intervene as the contending, often bitter antagonists struggle over long periods of time. Even those who feel judicial intervention is necessary are not particularly happy about having federal courts redistricting voting

districts, managing school systems, supervising busing plans, or running mental health institutions.

In the end the only real and lasting improvement in substantive results must come out of the administrative process. The courts can help by spurring such improvements as the U.S. Court of Appeals in the District of Columbia is now attempting. That court is formulating a set of guidelines for agency rule-making that aims to increase the fairness and efficiency of administrative decision-making. To the extent that the guidelines succeed, the need for judicial review will be reduced.

Alternative Third-Party Intervention

Mediation, arbitration, and investigative adjudication can be substitutes for or complements to courts, or a means of dealing with disputes that currently are not being processed at all. These techniques have worked well in labor disputes and are increasingly being used in public employment and community disputes.

Some pertinent experience comes from other societies. Investigative adjudication is an important principle of European criminal law and of some parts of civil law. Mediation is widely used in societies like Japan, and arbitration is employed in some countries to handle disputes we now leave to the courts.

Much of the experimentation with these alternatives in the U.S. has been in the settlement of individual disputes, where alternative methods are reputed to be cheaper and more effective than adjudication. When successful, they can be an attractive substitute for courts. In addition, new proposals seek to apply these techniques for social welfare disputes, high volume regulatory conflicts, and some complex public policy controversies.

Courts may make use of mediation and arbitration either before hearing a matter or at some point during the proceedings. Some key issues in this context are: To what extent are mediation/arbitration techniques applicable at different stages of judicial procedure? To what extent should arbitration be compulsory? What are the non-dollar costs of greater speed and cheaper access?

Thus far, courts have mostly used arbitration, although some of the newer proposals combine features of arbitration and mediation. A compulsory arbitration program in Philadelphia is now well established; it provides a financial ceiling of $10,000 per case; automatic assignment to arbitration, barring petition by either party for transfer to court, and review of the arbitrators' work. The system costs the city much less than formal court cases, and appeal rates are low (see page 45).

A number of states have medical malpractice arbitration statutes; some are attached to courts, some independent of them. In California, about 200 hospitals and several thousand doctors use the procedure.

In Michigan, there is a procedure that combines mediation and economic incentives for tort cases in which liability is not at issue (see page 29). Documentary evidence is submitted to a panel of three who recommend a settlement figure. Should the settlement not be accepted, attorney and trial costs may be assessed according to the difference between the settlement figure and the trial award, and which party refused the settlement.

Mediation has also proved effective in small claims cases in England and Sweden where small claims courts function mostly through the use of legally trained clerks who try to mediate cases before they are set for trial.

An increasing number of pretrial diversions from the courts to other programs use mediation techniques, with

varying degrees of success. These programs vary from alcoholism treatment centers and drug therapy centers to the use of neighborhood facilities as alternatives to the criminal justice system. Two such programs are operated by the Vera Institute of Justice and by the Columbus, Ohio, Night Prosecutor Program. The latter provides the complainant and the accused with mediation services to try to settle their problems before the accused is arraigned and the criminal process if formally invoked.

There is a new interest in courts with a mediation/arbitration orientation that use outside resources for intervention. Examples are the Boston Housing Court and the neighborhood mediation courts in the Bronx, New York. The terms "neighborhood court" and "community court" have been used in a variety of ways. Sometimes they refer to informal, non-coercive local bodies that use mediation and discussion; sometimes they are legally constituted courts. These courts, it is argued, would not wholly preempt other forms of dispute processing but would provide better dispute-settling procedures for certain kinds of problems. They are easily accessible, since they are run by those in the community, and can probably deal more effectively with disputes arising out of ongoing relationships. Although proposals for the operations of such courts vary, they mainly represent the fusion of two ideas: lower level specialized courts and informal mediation techniques.

In consumer issues, a variety of approaches to mediation and settlement both in this country and abroad provides a material for study and demonstration. In Sweden, a Public Complaints Board is made up equally of consumer and industry representatives. A consumer submits his complaint to the official of the complaint office in his municipality, and if some satisfactory solution cannot be worked

out at that level, the complaint goes to the Public Complaints Board. The staff then investigates, and on the basis of the investigation, the Board issues a statement on the merits and makes a non-binding recommendation to the parties for settlement. All submissions are in writing; there is no oral presentation. This non-coercive intervention relies heavily on bargaining between the parties, but the bargaining is backed up by ready access to a simplified small-claims procedure. Results of this system have been highly favorable—over 80 per cent of the disputes were settled without adjudication (see page 52).

The American Surgical Association recently proposed a system of state commissions to provide a prompt and simple method of compensating injured patients. Commission panels would review claims and recommend settlements. Compensation schedules and binding arbitration would apply where fault is not present (e.g. side effects of drugs, minor accidents in hospitals). Where fault is at issue, the injured party could elect either arbitration or court.

Other privately sponsored third-party techniques are being tried by the Better Business Bureau (voluntary arbitration), the American Arbitration Association (arbitration of auto-accident cases under no-fault statutes) and the Securities and Exchange Commission (mediation of small disputes between broker and customer).

The Major Appliance Consumer Action Panel (MACAP)—an independent organization supported by the Association of Home Appliance Manufacturers, the Gas Appliance Manufacturers' Association, and the National Retail Merchants' Association—is an example of the limited use of private codes of practice to handle disputes. The panel takes complaints concerning appliances on a toll-free phone number or by letter, refers the customer to the

dealer, serviceman, or manufacturer, and then gets in touch with someone at the decision-making level. (A similar and more extensive development involving trade associations is under way in England (see page 59).

To some extent the experience of MACAP was helpful in the formulation of the Magnuson-Moss legislation concerning product warranties. The legislation specified that manufacturers were to set up informal dispute-settlement mechanisms whose findings would be admissible in court. Thus far the legislation has not been fully implemented. The Federal Trade Commission is still in the process of issuing new regulations.

Ombudsman programs, which for the most part are undertaken by public authorities, are increasingly being used as alternative dispute-settlement mechanisms. Perhaps the best known are those that have been created in the executive offices of various states, often in response to pressure for more consumer representation. But in recent years, ombudsmen are beginning to play a role in correctional facilities, social welfare programs, and in other institutions, including universities.

A variety of other referral and investigation services are available. These range from fairly well-structured organizations, such as the Consumer HELP Center of Washington University's National Law Center, to the use of hot lines by local radio stations. To the extent that the ordinary citizen finds these services satisfactory, conflicts are resolved in what appears to be a cheap and fair manner.

Private parties have also tried to establish alternative conflict-resolution mechanisms for more complex disputes. Among these institutions are the American Arbitration Association's Community Disputes Services Department; the Institute for Mediation and Conflict Resolution in New York City; and the Office of Environmental

Mediation at the University of Washington (see pages 25ff.).

On the public level, important work in this area is done by the Community Relations Service (CRS) of the Department of Justice, which carries out both general counseling and mediation services. Working mainly on school desegregation issues, CRS has also handled some prison problems and done much work on both the preventive level and on the implementation of court decisions.

Systematic Reform

The rising volume and cost of court cases, together with a sense that whole areas of disputes can be handled more cheaply and fairly outside the court system or avoided altogether, has led to renewed discussion of systematic reform. One method is to look at underlying legal relationships and see if they can be modified to reduce the number of conflicts that arise in the first place. The most often cited examples are no-fault automobile insurance, no-fault divorce, and simplified lay probate, adoption, and real estate transactions. Decriminalization of victimless crimes, in addition to its equity rationale, also would help reduce conflicts and unclog court systems.

There are proposals for standardized arrangements as alternatives to individually suited transactions—such as uniform trust instruments, provisions for common consumer transactions, and service contracts. It has been suggested that the Federal Trade Commission take a more active stance in requiring certain elements in warranties and in sales contracts for cars, health spas, rentals, services, and the like. To some extent the recent Magnuson-Moss legislation moved toward specification of required common elements. Prepaid legal plans, particularly group

plans, may help produce standardized procedures for recurring transactions.

Some legal scholars have suggested that the courts discard the concept of contributory negligence, that condemnation proceedings be handled out of court, and that the principles of Workmen's Compensation be extended to product liability cases, with manufacturers paying damages according to fixed schedules. New Zealand's Accident Compensation Plan is the most extensive system-wide example of these ideas. Under it, fault, and even moral culpability, are irrelevant; the accident compensation plan routinely provides assistance, on a large scale if need be, for actual costs and losses—but not for trauma and suffering of a non-specific nature. Lawsuits for damages are not permitted.

In most instances, those who advocate systematic reform also favor settlement techniques other than litigation in the event that the routinized system does not produce satisfaction. Thus, no-fault automobile coverage cases that are snarled would be subject to arbitration.

Institutional Involvement

The Research Applied to National Needs program of the National Science Foundation has given some attention to issues of regulation, mainly from the point of view of economic incentives. The Edna McConnell Clark Foundation has provided funds for a project on rural courts and helped fund consumer action committees to handle small complaints. The Robert Wood Johnson Foundation has made a grant for arbitration in medical malpractice cases; the Lilly Endowment supports the American Enterprise studies on alternatives to regulation; the Carnegie Corporation is supporting a research project on academic

collective bargaining. The Rockefeller Foundation contributed to the support for the Office of Environmental Mediation, but its emphasis is on the international context. Most of the other major foundations are not active in this area, except for this Foundation's involvement, described below.

As a consequence of the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, the American Bar Association (ABA) and the American Bar Foundation (ABF) have initiated several projects. The ABF is engaged in studies and projects involving class-action litigation. The ABA has established a Special Committee on Minor Disputes; the ABA Commission on Law and the Economy, which is assisted by the Foundation, is discussed below.

The Institute for Judicial Administration is chiefly concerned with studies of the structure of state and federal courts, educational programs for judges and court administrators, and publication of research on the administration of justice. The National Center for State Courts has been concerned with encouraging and collecting better data on state courts, a study of judicial diversion, and mechanisms for creating more effective small claims courts. A relatively new organization, the Institute for Law and Social Research (a Foundation grantee), is working on a systems approach to the criminal justice system.

The American Enterprise Institute is exploring the role of information and incentives in regulation. The Center for Administrative Justice, an organization concerned with training and research in administrative law, has completed a large study of Social Security hearings. Other projects are under way at the Urban Institute, the Rand Corporation, the Stanford Research Institute, and Abt Associates.

Efforts in the universities include the Dispute Policy Resolution Study of the Law Center and Social Science Research Institute of the University of Southern California, under the directorship of Professor Earl Johnson, and the Center for Comparative Law at the European University in Florence, Italy, directed by Professor Mauro Cappelletti. Research studies by Professor Laura Nader at the University of California (Berkeley) and Ralph Nader's Center for Responsive Law are concerned with how people handle their complaints and the responses they get. There are also scattered projects in law schools and university-related public policy centers and institutes.

The Law Enforcement Assistance Administration has supported efforts in this area which have dealt with diversion, mediation of criminal complaints, the effects of speedy trial requirements, and the possible application of models of the civil justice system to criminal justice problems. Recently LEAA announced its intention to fund three neighborhood justice centers.

A broad study of regulatory reform has been undertaken by the Senate Committee on Government Operations and Commerce. This study includes reports on overlap of regulation, public participation, quality of appointments to regulatory bodies, Congressional oversight, and regulation versus deregulation. The study of the Oversight Committee of the House Interstate and Foreign Commerce Committee on federal regulation and regulatory reform has already been discussed, as has been the work of the Federal Judicial Center. The Administrative Conference of the United States is working on a uniform caseload accounting system for administrative agencies, discretion in the Food and Drug Administrative enforcement, and rule-making procedures in the Federal Trade Commission.

Finally, the Legal Services Corporation Research Insti-

tute is planning to sponsor research on new forums for dispute resolution and the effects of special legal institutions such as small claims courts, with a focus on the legal needs of the poor.

Ford Foundation Involvement

For some time, the Foundation has been working on the application of third-party techniques to community and other non-labor disputes.* Our major grantees have been the above-mentioned American Arbitration Association's National Center for Dispute Settlement and the Institute for Mediation and Conflict Resolution in New York City.

These grantees have mediated scores of disputes among ethnic and racial groups, between community groups, government agencies, and other institutions. Among the new mechanisms for conflict resolution that have been set up are the 4A program (*Arbitration As An Alternative*), which has eased court calendars and reduced costs, and the Public Housing tenant grievance procedures of the Federal Housing and Urban Development Agency.

Direct intervention in disputes is generally handled by local offices of the Community Dispute Services (CDS), an agency of the American Arbitration Association. Among the situations CDS has handled have been the disturbances at Hyde Park High School in Boston; a conflict over proposed low-income housing construction in Philadelphia; and a boycott of the United Givers Fund by blacks in Mississippi. In addition, training activities offer potential antagonists a clearer understanding of the negotiation process. Seminars and workshops are held for educators and local government officials.

*A detailed account of these grants is given in *Mediating Social Conflict*, available from the Foundation on request.

The Institute for Mediation and Conflict Resolution is centered in the New York metropolitan area. It has mediated many types of disputes, such as a conflict between a Puerto Rican youth group known as the Young Lords and an East Harlem church, and a complex ethnic-racial school dispute between Columbia University and the Harlem community. With the cooperation of the Police Department of the City of New York and funding from the Law Enforcement Assistance Administration (LEAA), the Institute has established a Dispute Center in upper Manhattan to divert misdemeanor cases from the criminal justice system. It also runs an extensive training program that gives a series of courses each year in techniques for settlement of group disputes and employs as faculty outstanding mediators, arbitrators, experts in the practice of collective bargaining, and leaders of industrial, labor, and community organizations.

The Foundation also has made some small exploratory grants to test the opportunities for a broader program. These have confirmed the need, and have prompted us to proceed with further program development, as reflected in this paper. One grant was given to the Office of Environmental Mediation at the University of Washington to explore the use of third-party intervention in environmental disputes in the Pacific Northwest. Its most significant and successful effort centered on the long-standing controversy over the Snoqualmie Dam in the State of Washington. Another recent effort led to settlement of the protracted controversy over the construction of Interstate 90 in the Seattle area and probably saved $700 million in costs.

A grant to the New Jersey State Department of the Public Advocate, which has a unique combination of responsibilities—mediation plus public interest law—seeks new ap-

proaches to conflict resolution. And in the correction field, grants have supported the Center for Community Justice, which has been developing grievance procedures and mechanisms for use in prisons. The Foundation has assisted the Center of Comparative Studies at the European University in Florence, Italy, which is collaborating with the University of Southern California Law Center in seeking out promising dispute resolution techniques in several countries and constructing a data base for further research.

A recent grant to the American Bar Association's Commission on Law and the Economy charged it with the responsibility to help rethink the way in which the government intervenes in the economy. The Commission, composed of distinguished lawyers, judges, and social scientists, is focusing on the processes, procedures, and structures for regulatory decision-making. In addition, a conference of environmentalists and union representatives was funded to encourage discussion of the relationship between environmental and employment concerns. And we have followed up on that initiative with a small grant to the Urban Environment Foundation. Finally, we intend to document a number of significant third-party interventions and to publish the results in a volume that will also explore the policy implications of these efforts.

III
Promising Alternatives

Promising alternative institutions, procedures, and ideas for the resolutions of disputes are beginning to appear in the United States and Europe. While it is difficult to adapt procedures from one society to another or to broaden their scale from small to large localities, many of the alternatives may well be transferable. One purpose of this review is therefore to see how the essential features of each mechanism can be identified and, with modifications, used in other situations.

STRENGTHENING THE CAPACITY OF EXISTING COURTS AND AGENCIES

Economic Incentives

Economic incentives, for matters that stand a reasonable chance of being settled, can cut costs to the parties, reduce delay, particularly where there is a heavy calendar, and leave the courts freer for matters which cannot be amicably settled. However, there is a danger that economic incentives can become coercive. To be fair, both the incentives and the risks should be equally distributed among the parties. Devising such a system is difficult, and there is a special problem when the dispute is between an individual and a large institution. For example, an insurance company is in a position to distribute its burden of risk and error over its total operation and to look at a particular case in the context of its overall financial picture, while the individual enjoys no such advantage.

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There has been little practical experience with the use of economic incentives outside of the English Payment-Into-Court System. "Payment-into-court" is a procedural device which English courts have designed to promote settlement of civil claims. The defendant offers a sum of money by way of full settlement of the claim. If the offer is accepted, that is the end of the case. If it is not accepted, and in the event that the claimant recovers more than the offer from the decision of the court, the ordinary English "costs rule" applies and the claimant gets his judgment plus costs. But if the judgment is for an amount less than the sum paid into court, the usual consequence is that the claimant must pay both his own and the defendant's costs from the date of "payment-in." This may be made at any time and the amount paid in can be increased at any time. Once money has been paid in, it cannot be withdrawn by the defendant without the consent of the court.

The procedure works best where the dispute is concerned with damages and not liability. If the defendant calculates that he may be right on liability, he is less likely to offer anything. The system is based on the plaintiff's fear that failure to accept the offer paid in will result in his losing much of the damages he may get by having to pay his opponent's costs, which can be high, and his own.

Even though this system does tend to promote settlements and saves the community a number of costs, it has been criticized by a number of commentators because it greatly favors the defendant, often the economically stronger party. This is particularly the case in a personal injury action against an insurance company. The risk is solely on the plaintiff. There is no penalty to the defendant, and the only risk he faces is the possibility of making an offer above the value of the case.

In the Michigan mediation system a three-person panel

made up of lawyers and a trial judge sit together as a panel for a period of two weeks primarily to hear tort cases in which there is a dispute about damages. No oral testimony is allowed, and the evidence is limited to certain documentary items. The panel discusses each case with the lawyers for a short period of time, deliberates, and gives a figure for settlement of the case. If the case is not settled for that sum, the plaintiff must obtain at least 110 per cent of the sum at trial to avoid being taxed costs of the trial and attorneys' fees. The defendant must pay a similar fee if he refuses the settlement and the recovery is more than 90 per cent of the amount agreed upon by the mediation panel.

There has been little evaluation of the Michigan experience, but it does seem to be a fairer approach than the English system. The risk is on both the plaintiff and the defendant, and each stands to lose if a reasonable offer is not accepted. On the other hand, the system is more expensive to society because there is an independent evaluation of the case by the panel before the trial. Furthermore, there is a question as to how many cases could be expeditiously handled in this somewhat elaborate manner. Another criticism comes from the Chairman of the American Bar Association Litigation Management and Economics Committee who feels that the attempt to settle comes too late in the process, after there have been pre-trial motions and the considerable expense of "discovery." His suggestion is for compulsory arbitration at an earlier stage of the proceedings, within certain financial limits.

Professor Mauro Cappelletti of the European University and Earl Johnson of the University of Southern California are of the opinion that economic incentives can be used to encourage settlement if a fair and efficient system can be devised. Johnson suggests that both parties be required to submit a final binding offer to the court. If these offers

overlapped, the court would declare a settlement; if not, the trial would proceed and a financial penalty of some sort would be levied on the party whose final offer proved to be the least reasonable, in the sense that it differed most from the final court or jury award. The penalty could either be in the form of costs to the other side or a percentage of the difference between the unreasonable final offer and the judgment in the case. The percentage could be set by a sliding scale which would take into account the unreasonableness of the offer. This, in turn, would intensify the pressures on both parties to make as well as to accept reasonable proposals. However, the incentive effects would probably be greatest if the sum of money could simultaneously constitute a payment for one party and a reward for the other. There could also be some allowances made for the timing of the proposals; that is, the more timely the offer the less the percentage of penalty.

Johnson also suggests that if one of the parties is a large institution, significant financial penalties be imposed if its settlement proposals are found to be unreasonable. The rationale is that the institutional party would then be motivated to propose terms which the individual party would consider reasonable. Whether settlements would then be higher with a concomitant increase in insurance premiums is not clear. A demonstration of these ideas would help determine whether more disputes would be resolved at less litigation cost to both the parties, and whether more individual litigants would have improved access to conflict resolution procedures.

Reducing Delay—Stuttgart Model

The Stuttgart Model for the disposition of civil cases is an interesting procedural device for reducing delay, and

according to its proponents it is improving the quality of the administration of justice. It was developed by Judge Rolf Bender in Stuttgart, Germany, and has been copied or modified for use in a variety of courts, mostly in matters of general civil litigation. Some variation of the Stuttgart procedure is used in one-third of the civil courts in Germany.

The procedure is as follows: While the written documents—complaint, answer, and reply—are being exchanged, the circulation of these documents is entrusted to the clerk's office, which keeps up the files, handles requests from lawyers, and obtains other material referred to in the documents where necessary. Thus, by the time the final reply has been received and the files placed before the judge for review, the relevant material has been so well processed that the judge has a complete enough file to undertake a meaningful preparation for trial.

All cases at this level are tried by three judges who decide both the facts and the law, and the judge primarily assigned the case briefs his colleagues. The full court decides what instructions should be given to the parties on supplementing the facts as well as on the crucial legal issues in the case. The matter is set for trial, and the proceedings begin with a full hearing of the parties so that the facts are clarified and any misunderstandings cleared up. The judges play an active role in discussing the case, while the parties are called upon to respond in a spontaneous and informal manner. At this point the witnesses have not yet been sworn in or heard. The court then makes a proposal, supported with reasons, for the conclusion of the case, suggesting a settlement, a withdrawal, or acknowledgement of the complaint. The parties and their attorneys are called upon to offer their acceptance or their detailed reasons for rejection.

If the proposal is not accepted, a hearing on all the evidence takes place. After the trial is concluded, the judges make a second proposal for settlement of the case, which looks very much like a proposed final judgment. If this is not accepted, the attorneys present their concluding arguments which in reality are "little appeals" against the proposed judgment.

Studies by the Institute for Empirical Legal Research at Stuttgart bear out the contention that this procedure is quick and efficient. For 85-90 per cent of all civil proceedings only one hearing is needed to conclude the case whether by settlement or decision. More than 2 hearings are rare, and 2.1 hearings were found to be the average for proceedings ending with a judgment as compared to 6 hearings in courts not using the Stuttgart Model. Parties employing it were able to move 86 per cent of their cases to judgment in 6 months or less as compared to 24 per cent in courts employing the traditional procedures. Stuttgart Model courts disposed of 97 per cent of their cases within 12 months, as compared to 59 per cent in other courts.

Proponents also argue that the quality of justice administered is better, in that the active participation of the parties in the process from the beginning leads to more settlements and, equally important, a better understanding by them of the judgment of the court if no settlement is reached. The constant interaction between the court and lawyers in the decision-making process gives the parties a better understanding of the range of competing interests involved and of the rationale of the court's decision.

The whole emphasis of the Stuttgart Model is on arriving at a settlement. The possibility of a surprise judgment is almost non-existent, and only 6.7 per cent of the proceedings handled through the Model lead to an appeal, as compared to 11 per cent for the traditional court

procedures. About 75 per cent of the attorneys surveyed by the Institute of Empirical Legal Research seem to have a favorable reaction to the procedure. Attorneys calculated that they use only half as much time when the Stuttgart Model is used.

Those who criticize the method argue that there is the possibility of bias against or an element of coercion for the party who does not want to settle on the terms suggested. While it might be better for other judges to handle the case when the settlement has been rejected, that additional complication would defeat much of the efficiency of the procedure.

There are almost no figures available on the total court costs in jurisdictions using the Stuttgart Model. While there is clearly a saving to the litigants, there is little analysis on how much time the judges require to go through the whole process.

The key to success of the Stuttgart Model lies in the active participation of the parties and the forceful role of the judges. Both elements are usually missing in trials in the United States where there is more reliance on the adversary system and judges are usually more passive. Moreover, the constitutional right to a jury trial in the United States further complicates the matter. The real potential of the Stuttgart Model in the United States would probably be at some point in the pre-trial stage. There would still be problems: for example, lawyers may be very reluctant to have their clients participate actively in the case and might have difficulty allowing them to respond spontaneously and informally to an inquiring judge in the presence of their opponent. Also, the Stuttgart Model works with three judges, and there is no comparable experience with one judge. However, the active participation of the parties is a stimulating idea, and with some

slight alteration of the judges's role in the direction of playing a greater part in reconciling cases, more settlements may be reached in a quicker and cheaper way.

Administrative Review

An approach that could be examined further is being tried in Australia in the form of review of the actions of administrative agencies. Following a study entitled the *Final Report of the Committee on Administrative Discretions*, the Administrative Appeals Tribunal Act of 1975 was passed. This act established an administrative appeals tribunal of senior legal practitioners with experience in government, business, economics, and public administration.

Any person whose interests are affected by an administrative decision may appeal to the tribunal. It has the power and discretion of the original administrative decision-maker: it can send the matter back for reconsideration, affirm, or even make a new decision. When government action is the subject of inquiry, the tribunal may require the administrator to give full and genuine reasons for his action. The appellant is thus given an opportunity to understand the nature of the case against him, and the agency is given a chance to reexamine its decision. Proceedings are conducted informally in an effort to avoid over-judicialization and where feasible, there is a pre-hearing conciliation session which emphasizes settlement. The tribunal also has access to government files. In the opinion of the framers of the program, this power, together with the emphasis on informality and pre-hearing conciliation, should counteract tendencies to resort to the adversary process to establish the underlying facts. There is a procedure for judicial review, but the courts are restricted

to reviewing questions of law only. The act is so new that little is yet known about how it works and how the law courts will handle matters appealed to them after the Administrative Tribunal has acted.

In Germany, several special courts have been set up to review administrative action. The *Verwaltungsgerichte* (Administrative Courts) decide disputes which arise out of the activities of state or community authorities. The *Sozialgerichte* (Social Courts) decide disputes involving public insurance carriers, primarily those concerned with pension claims. The *Finanzgerichte* (Tax Courts) handle revenue law disputes.

In the ordinary civil case, the law presumes equal parties and no special provision (e.g. for costs) is made. But in matters between the people and the state, the German procedure assumes that no such equality exists, and special procedures therefore have been set up to deal with this situation.

Before a suit can be filed in courts that review administrative actions, the plaintiff must go back to the authorities, who check their decision again. Security for court costs is not required. Most important, these courts do not have to restrict themselves to the evidence presented by the parties, but have the power to use other information and institute investigations on their own behalf. Thus, these courts are capable of offsetting the lack of resources on the part of individuals who challenge official action.

The procedure is less formal than in regular courts, and lawyers are not required. The proceedings in the administrative courts are somewhat like a trial *de novo* with limited appeal from the decision. The courts have the power to annul the agency decision and to ask for new consideration.

Administrative courts do not have the power to decide

the constitutionality of a statute, but they may annul an administrative act on grounds of unconstitutionality. The Federal Constitutional Courts have the power to pass on the constitutionality of statutes on which administrative acts are based.

There are approximately 900 administrative judges in Germany. Each year about 60,000 cases are started on original jurisdiction. Of these, about 10,000 go up to an Appellate Administrative Court and about half go to the Supreme Administrative Court. Little is known about the impact of these procedures on the number of cases reviewed by the courts. Are agencies more careful and if so, do the courts tend to challenge the findings less frequently? The idea of going back to the agency before filing a suit may be worth considering. Of course, the power of the court to search files on its own is a more complicated issue but may also be worth investigating.

Reform of Agency Procedures

RULE MAKING

Several federal agencies are in the process of experimenting with various procedures for better management of the conflicts that come before them. These experiments are worthy of study in their own right; they are also of importance for their potential applicability to other agencies at both the federal and state levels.

Some important work is being done with informal rule-making proceedings in which affected parties have an opportunity to suggest how the rules should be written. While rule-making of this type is a move away from the adjudicative model, it is not necessarily a move away from an adversary approach. Indeed, both Congress and the courts have placed requirements on informal rule-making

to ensure that it does preserve some adversary (and adjudicative) features in the interests of fairness and accuracy.

Examples of this approach are the licensing procedures of the Nuclear Regulatory Commission—large, complex, technical disputes that require formal adjudicatory sessions. In an effort to expedite these proceedings, the agency has identified some common issues that recur in many of the license applications and has been trying to settle these common issues through informal rule-making, with the idea that once these generic issues are resolved, extensive relitigation for each license application can be avoided. Examples of such issues are the establishment of mandatory performance criteria for emergency core-cooling systems and determination of what constitutes "as low as practicable" radiation emissions from nuclear power plants. The adjudicatory procedures vary. Some allow cross-examination and discovery; others are restricted to oral and written comments only. Generally speaking, the agency has afforded more opportunities for participation than minimum notice and written comment by interested parties, and some commentators think there will be far less procedural complexity and delay than occurs when these issues are litigated through formal adjudicatory procedures for each license application.

The Federal Power Commission (FPC) has followed a similar course in rate-making for natural gas. The prior practice had been to set rates on a company-by-company basis with each case handled by a formal adjudication. The process was so slow and cumbersome that the Commission was called "the outstanding example in the federal government of the breakdown of the administrative process," in the 1960 Landis Report to the President-Elect on the Regulatory Agencies. Then the agency decided to consider

in one process the rates of all companies within a geographic area, but again with full adjudicatory hearings. The first such involved 384 parties and 30,000 pages of transcript. Although the results were upheld by the U.S. Supreme Court, it was not the course to take. The FPC then decided to use informal rule-making to set some rates, a course which has been approved by the Courts.

Another example of the use of rule-making, albeit in an agency which has to handle a large number of disputes, is the Federal Drug Administration (FDA). In dealing with over-the-counter drugs, of which there are great numbers, the agency has adopted an approach something like the FPC's rule-making approach to rate-making. The FDA formed expert advisory panels to review classes of drugs for safety and effectiveness, and to recommend rules. The procedures go beyond notice-and-comment rule-making. In appropriate cases oral argument is permitted but not cross-examination. And for disputes over safety and efficacy—decisions that do require adjudicatory hearings—the agency, with Supreme Court approval, has changed the rules of evidence to require higher levels of scientific proof before a factual hearing is granted. The new procedures represent an improvement in agency performance.

The Environmental Protection Agency (EPA) has established an elaborate internal system for the development of proposed rules in which other government agencies and relevant parties are consulted as those rules are worked out. Another innovation of the EPA is to publicize its system when the proposed rule is submitted for comment. The Federal Trade Commission has now started to promulgate rules as to what constitutes an "unfair method of competition" within the meaning of Section 5 of the Federal Trade Commission Act instead of proceeding strictly on a case-by-case basis. The Supreme Court has

upheld an ICC rule dealing with incentive rates for freight car usage, a ruling which was the consequence of a study rather than of a formal hearing.

Under the general heading of reform of agency procedures, some agencies have become more concerned with management strategies that permit them to tie planning more effectively to programs, and to make better use of evaluation and other information retrieval techniques. Management and quality control techniques attempt to gather information about decisions at all levels, to establish controls, and reduce errors. Although these techniques have a broader application than conflict-resolution, they are very much related to it. Better information collection and better management should lead to more accurate agency decisions, more control of discretion and less arbitrariness, thus reducing conflicts based on errors and misinterpretations of laws and policies, and, one hopes, increasing acceptability of decisions.

Finding out what is going on in agency operations and then trying to do something to control such activity has been a problem for some time. Most of the management activity has focused on budgetary controls, beginning with the burst of enthusiasm in the 1960s for Planning, Programming, and Budgeting Systems (program budgeting). However, experience seems to indicate there are difficulties in generally applying standardized budget-oriented management systems to all agencies. In some agencies, the experiences with PPBS were unrewarding, although efforts continue to devise some budget-linked management system. In the meantime, the development of improved evaluation of government agencies is continuing as an important aspect of agency reform. The emphasis is on more specification of procedures and objectives as well as on the collection of better information.

MANAGEMENT

The management and quality-control techniques pertaining to all large bureaucracies have a special bearing on social welfare agencies. Management-control techniques in this area have been devised as methods for giving central offices more control over field offices and for ensuring compliance with basic agency policies. They have focused on reduction and control of administrative discretion as one aspect of the broad problem of reducing conflicts by reducing errors and inequities. Special problems arise, however, because social welfare programs are usually highly decentralized and in many instances emphasize individualized treatment. Both the Veterans Administration and the Social Security Administration have elaborate systems for supervising and evaluating claims decisions. Through a series of monthly statistical reviews supplemented by intensive individual studies, management is able to detect deviations from administrative policies. Although the review systems are not designed to correct errors in individual decisions, they do tend to contribute to fairness in administration for the system as a whole. And to the extent that discretion and errors can be managed, pressure to protect clients' rights is lessened somewhat. Other scholars have suggested the introduction of reporting systems that would permit improved monitoring of individual office dispute-settling practices. Recently, on a test basis, routinized case-file handling forms were introduced for Legal Services offices.

To some extent, many of the concerns in the last decade over management have stemmed from oversight agencies exerting pressure. The General Accounting Office, traditionally charged with collecting data for audit and accounting purposes only, has engaged since 1970 in much more sophisticated quality-control studies and has been

working closely with state and local governments to improve their review and audit capabilities. There are at least three other legislative institutions which are now engaging in quality-control work: the Congressional Research Service of the Library of Congress, the Congressional Budget Office, and the Office of Technology, and there are proposals for several other kinds of legislative evaluative oversight agencies. On the executive side, the principal developments for oversight and evaluation have been centered in the Bureau of the Budget and then in its successor, the Office of Management and Budget. These oversight agencies have had a mixed experience in trying to develop management information and quality-control systems. Ideally, as part of agency reform, management and evaluation processes should reduce conflicts. As yet, however, the new strategies have been too little tested and the problems too complex for any significant conflict reduction to have occurred.

Another approach to the problem of reforming agency procedures is the hearing process. In *Goldberg* v. *Kelly* (1970), the Supreme Court held that notice, opportunity to present oral testimony, confrontation and cross-examination, right to counsel, an impartial decision-maker, and a record were necessary before welfare benefits could be cut off. In a series of subsequent decisions, the court continued to apply the Due Process Clause, although it was somewhat more flexible on the amount of necessary adjudicatory requirements. Recently, however, the court seems to have swung the other way and held that a denial of disability benefits does not have to be preceded by a hearing *(Mathews* v. *Eldridge)*, and that hearings can be dispensed with altogether, without violating the Constitution, for the termination of non-probationary employment *(Bishop* v. *Wood)*. Although it is difficult to predict how

far the Supreme Court decisions will apply, it seems clear that there is a great deal of leeway presently in fashioning the procedures for hearing client claims. The formal adjudicatory model laid down in *Goldberg* v. *Kelly* was designed to make the most of the hearing process, but that system was rarely implemented successfully. The challenge now is to devise alternative systems to the adjudicatory model that have a better chance to obtain fairness without sacrificing efficiency.

There have been some experiments in modifying the formal adjudicatory model in social welfare disputes. One approach is to provide government officials for the investigation and mediation of client complaints. Prior to 1968, the Wisconsin State Department of Health and Social Services district directors were very successful in investigating and mediating client welfare complaints against county departments of welfare. This system of official investigative mediation is a variation of the ombudsman, the official who receives and investigates citizen complaints. Although ombudsmen do not usually act as formal mediators, the fact that their concern with individual justice causes them to investigate claims often leads to settlements and adjustments.

There are other ways in which the treatment of individual claims in social welfare agencies can be improved. The Massachusetts Commission Against Discrimination has used mediation and fact-finding in an effort to reduce the time for handling complaints filed with it. The Center for Community Justice has worked with the San Francisco office of the Community Dispute Services Department of the American Arbitration Association (formerly known as the National Center for Dispute Settlement) in designing grievance systems for California institutions which provide neutral third parties as advisory arbitrators for dis-

putes concerning rights of wards and conflicts over staff conduct. The same office has also designed a grievance system for public housing authorities in cases of landlord-tenant conflicts. In the medicine and public health area, new mechanisms have emerged to cope with problems of conflict between patients, professionals, hospitals, and insurers. For example, more attention is being paid to informed consent, professional peer review, the specification of patients' rights, and the use of patient advocates. The theory is that disputes will be reduced if there is more definition, information, disclosure, and informed consent before decisions are made.

ALTERNATIVES OUTSIDE THE FORMAL SYSTEM

Arbitration

Arbitration is increasingly discussed as an alternative to judicial and administrative processes. While most experience has been with voluntary programs, it may be that the greatest potential for cost savings lies with compulsory arbitration, particularly if plans can strike a balance between fairness and efficiency. Compulsory arbitration can free courts for more substantial disputes, and depending upon the issues involved, it may reduce cost to litigants and be a more effective way of solving problems.

For other than small claims, compulsory arbitration has been used mostly in the United States, but even here it is limited. All of the plans provide access to the courts through an appeal *de novo* (back to the beginning) because of the constitutional right to a jury trial. However, compulsory arbitration raises difficult issues of accessibility to the courts. An appeal may cause financial hardship and further delay. Thus, if the plan is not carefully constructed

and operated, it can be an additional barrier to the courts rather than a cheaper, quicker way of resolving disputes.

Among the more interesting examples in this country, Philadelphia, Los Angeles, and the Commonwealth of Massachusetts provide some insight into the use of compulsory arbitration. In Philadelphia, a case that is under $10,000 is automatically assigned by the court to arbitration. If the case exceeds that amount, it can be moved at the joint request of the parties. There is also a provision which allows transfer of a case assigned to arbitration back to "major civil case" status. In deciding on such a motion, judges weigh anticipated complexity, length of trial, extent of injuries, economic implications of the case for the parties, and the likelihood that the case, if arbitrated, will be appealed and thus be in the courts anyway.

Arbitrators, usually three, are selected by the deputy court administrator from a panel of lawyers. The arbitrators make no advance preparation, basing their decisions on the pleadings supplemented by oral arguments by the attorneys for the parties. All appeals for a jury trial are monitored by a computer. Although it does not often happen, an arbitrator is liable to be struck from the panel if his judgment has been appealed more than three times.

Hard figures on cost are not available, but it is estimated that the average arbitrated case costs 1/5 less per day than it would in the Philadelphia court system. In addition, there is a substantial savings in lawyers' time and fees. Furthermore, only 3 per cent of the cases in Philadelphia assigned to arbitration return to the courtroom.

A review of the Philadelphia experience by the Access-to-Justice Project of the Comparative Law Center indicates that such arbitration is less complicated, tends to rely less on precedent, and requires a less complex factual basis for making decisions. The objective is a compromise resolu-

tion rather than a win-or-lose result. Most observers feel it is less costly to the participants as well as to the state. Lawyers generally like it, although some are worried about the negative impact on their practices. On the other hand, some defense lawyers in Philadelphia feel that since arbitrators tend to be plaintiffs' lawyers, the system is biased towards plaintiffs.

Since July 1976, the Los Angeles Superior Court has had compulsory arbitration of civil cases if the plaintiff so elects, and if recovery is limited to $7,500, exclusive of costs and interests. If there is a cross complaint, arbitration can take place by stipulation only. Arbitration is free to the parties, with the state paying the arbitrator $150 per hearing. There are 330 arbitrators, half chosen by the plaintiffs' bar from the defendants' bar, and half vice versa.

This plan is closely modeled on the Los Angeles Superior Court Attorneys' Special Arbitration Plan (ASAP), a voluntary plan tested for several years. According to estimates by the presiding judge of the Los Angeles Superior Court based on the ordinary civil court trial costs in a three-year period, about a million tax dollars have been saved under the ASAP program. "Discovery" (case preparation) was considerably less complex; a witness-signed document substituted for oral testimony, and it was estimated that lawyers' time was reduced by more than half. About 450 cases a year were handled. On the average, it took 35 days from the onset of arbitration to final decision, as opposed to the two years it would have taken to handle the same cases if they had gone to trial. The average arbitration hearing for personal injury cases took 2½ hours as compared to 4.7 days of average jury time.

In Massachusetts, cases are referred to arbitration at the discretion of the Superior Court, which can appoint arbitrators to hear the case. Cases are referred irrespective

of amount or issues. Whether a matter is referred or not seems to depend primarily on each judge's assessment of the congestion in the court.

Both the English and Swedish systems for handling small claims have procedures for arbitration, aspects of which are compulsory. The 1973 English Administration of Justice Act significantly reformed the procedures for the collection of small claims. It made it easier to proceed without a lawyer in an informal mandatory arbitration proceeding. If there is a claim for less than £100, the judge can refer the matter to arbitration on his own motion. If one party requests arbitration, the registrar of the court can institute it. And if the claim is over £100, the parties can request arbitration by agreement. The registrar (usually a solicitor) is often the arbitrator and actually appears in about half the cases. The arbitrator can adopt any method of procedure "which he may consider to be convenient and to afford a fair and equal opportunity to each party to present his case." This procedure is being used increasingly, but it is too soon to know the total impact of the reform.

The Swedish small claims court established in 1972 is similar in its informality, simplicity, and attempt to keep costs at a minimum. There is free assistance in preparing forms and a severe limitation on appeal rights. Several innovations seem particularly important: the judge is mandated by statute to seek to settle the case, whether by mediation or arbitration, and he can reach out for expert advice or help in resolving any issue in the case at the expense of the state. As in England, the clerk of the court plays a key role, and he is under an obligation to try to settle the case at the initial stage. The clerk is usually someone with legal training.

The small claims courts in New York City also have an arbitration option that bears more evaluation. In these

courts, arbitration is informal and non-compulsory. The court is accessible at night. Law advocates, who are trained neighborhood residents, are used to help litigants with the preparation of forms and the handling of their cases.

If voluntary arbitration is to become widespread, arbitrators, at least in the non-commercial areas, might have to be paid by the state. Except for the Los Angeles Superior Court arbitration plan, there has been almost no experience with state-supported arbitration. There are also some interesting proposals pending in Sweden and Germany which would enable judges to act as arbitrators. In the Swedish proposal, the parties would agree that courts of first instance would act as arbitration boards, with two lay arbitrators chosen by the parties to function as extra judges. The idea is that ordinary court procedure ought to afford the possibility of more informal proceedings ending with a final decision at no extra cost to the parties.

Conciliation

The Public Offices for Legal Information and Conciliation (ÖRA) in Hamburg, Germany, is an interesting and unusual institution for providing legal advice, conciliation, and arbitration services to a wide range of people in a city of 2 million. It is attached to the labor and social services offices of the city administration, with a main office and 26 branch offices in every part of the city. The staff is composed of 10 full-time members and 93 voluntary presiding officers and advisers, including 64 judges, 11 attorneys, 5 administrative attorneys, and 3 district attorneys. These advisers serve without pay but receive a small fee (25 DM) for each matter they work on. The willingness of judges (including appellate judges) and senior lawyers to serve is an important part of the program.

Half the support of the ÖRA comes from city funds and half from fees charged the users. The office furnishes advice in about 60,000 matters a year. Staff members are obliged to secrecy, and the ÖRA is not permitted to represent a person before the courts. The office prides itself on its neutrality and sees its basic mission as an attempt to bring about an amicable settlement of competing interests; the approach is one of mediation, not advocacy.

The ÖRA has two fairly distinct operations, although there is some overlap. The legal advice and conciliation service, which is primarily for poor and moderate-income people, charges a reasonable fee. When a client comes in, he is interviewed by the staff and then sent to a volunteer with experience and knowledge in the area of his problem. The volunteer, usually a judge or lawyer, will give advice if necessary, try to arrange a meeting with the adversary, and see if the matter can be conciliated. The volunteer will follow up with a letter or other communication as needed. If there is a legal right involved and the matter cannot be reconciled, the party is advised to see a lawyer chosen from a special panel of lawyers who work with the ÖRA. According to 1975 statistics, about 3,000 advisory conciliation matters were handled by the office in one year, including family, landlord-tenant, social insurance, labor-management, and small-scale consumer problems.

The second area of operation of the ÖRA is arbitration, which is open to all persons regardless of income. A sliding fee scale has been set up—1 DM to 2000 DM, depending on the value of the matter. The service has wide acceptability in the Hamburg area; about 2900 cases were arbitrated in 1975, with a number of clients from large corporate interests. The rulings handed down are recognized and enforceable in court.

The ÖRA has a great deal of prestige in Hamburg and is

known in the community for its impartiality and service orientation. Judges and other public figures are eager to volunteer, and since the volunteers are all highly respected members of the Hamburg community, they are in a good position to mediate and settle matters. One of the problems in duplicating the ÖRA elsewhere would be to find citizens of comparable stature. In other communities, it may be impossible to get judges to serve in this volunteer capacity. However, there may be different resources that could serve a similar function. Other questions are now under study—the degree of participation of the parties, the impact on the courts, and the role the ÖRA plays in the community.

Conciliation within court systems has occasionally been used in other than socialist countries. While both France and Australia have provisions which enable judges to act as conciliators, they have rarely used their power. Under German procedure, a judge can schedule a special concilation hearing in civil cases without the attorneys being present at any time. Since judges prefer to settle with the attorneys and the parties, this procedure has been rarely used.

General characteristics of conciliation courts are informality, non-legalistic procedure, limited jurisdiction, lay judges from the neighborhood, and free access. They tend to be non-coercive and to rely on community self-administration. They can best be defined as informal, non-professional, community-controlled forums for dispute resolution.

There has not been much experience with these courts in the United States. One question is whether, in a highly mobile society, parties will voluntarily comply with informal decisions made in communities in which they may not have roots. Several examples may provide some in-

sights: the New York City housing court, the Los Angeles family court, and the now defunct East Palo Alto Community Responsibility program. The Community Justice Board Program (CJBP) in San Francisco, for which the Foundation made a grant of $85,000 in 1978, is a community-based effort in neighborhood resolution of minor criminal matters, neighborhood disputes, and certain civil complaints. CJBP takes cases directly from law enforcement agencies, social service departments, other public bodies, and from the community in various San Francisco Bay area neighborhoods. Disputes are resolved by panels composed of neighborhood residents who are trained in mediation skills and assisted by full-time staff.

The Los Angeles Conciliation Court, which has been functioning since 1954, tries to effect a resolution between couples with marital problems. Any party may institute proceedings. Even though the procedures have been widely copied by many family courts, especially in California, and are respected by experts, the process has not been transferred to other kinds of problems.

The housing court in New York City tries to use conciliation and mediation to solve landlord and tenant disputes. Few cases go to trial and the hearing officers are not judges but persons from the community with knowledge of the housing industry. There is also an advisory council which reviews the functions of the court and screens applicants for positions as hearing officer. The court can consolidate into one action all pending actions concerning any building and can employ any authorization, remedy, or sanction it feels would be effective, regardless of the remedy sought. The court retains jurisdiction until all violations have been removed. With broadly-defined powers, hearing officers are allowed wide direction.

The East Palo Alto Community Youth Responsibility Program (CYRP) was a community panel which heard juvenile cases referred to it by the police, the county probation officers, and the schools. The parties could not invoke the panel, and all cases had to be referred. Serious offenses were not accepted. Participation in the program was voluntary. There was no appeal from the panel's judgment, and the juvenile could withdraw at any time. If he withdrew, he was transferred to the county juvenile justice system. The procedures were informal, placing emphasis on education and conciliation, and the sanctions were primarily non-coercive and community oriented. The program was never fully evaluated, although many observers thought it an important and helpful approach. It started with LEAA funds and went out of existence when county funds were stopped during a period of financial retrenchment.

The Swedish Consumer System

The Swedish system for handling consumer disputes is an important reform combining conciliation and investigatory adjudication. This system provides a full range of consumer protection for the merchant and the consumer and is a unique combination of private and governmental action. It developed over a number of years after a series of formal commission inquiries, and arose out of a need to have a feasible alternative to the courts.

In many areas of activity in Sweden, citizen groups such as workers and tenants play an important complementary role in the enforcement of law. Where such groups are strong, some of the responsibility for guiding conduct resides in them rather than in the state. However, since there are no large private organizations in the consumer

area with power equivalent to that of the merchants, the state was given the prime responsibility as the representative of the consumer when the consumer protection system was devised.

The system has a number of parts. Pursuant to statute, the National Swedish Board for Consumer Policy is responsible for disseminating information concerning the preventive and remedial aspects of consumer protection. Pamphlets are distributed, and there is an extensive media campaign aimed at informing the consumer. When a controversy arises between a buyer and a seller, the buyer is advised to seek aid from the consumer secretary's office in the community where he lives. If a settlement between the buyer and seller cannot be reached, the buyer is sent to the Public Complaints Board (PCB). On rare occasions the buyer would be advised to file a suit with the small claims court.

The PCB can resolve all disputes between merchants and consumers concerning goods and services, as well as legal questions of rights and duties. Only consumers can bring a matter before the Board; merchants are restricted to small claims court. The decisions of the Board are not legally binding or enforceable; they are merely recommendations. However, the makeup and prestige of the Board are such that recent figures show that over 80 per cent of its recommendations are followed. The services of the PCB are available to all consumers regardless of their financial condition, and there are no costs for either party.

The Board has a secretary, a full-time chairman, and ten departments, each with an equal number of consumer and business representatives. Appointments are made by the National Board for Consumer Policy primarily on the recommendation of the organizations and official bodies interested. All costs of the operation are borne by the state.

The PCB secretary plays an important role, both in providing assistance to the consumer and in attempting to settle the case. About 20 per cent of the cases before the Board are successfully settled. The secretariat also gathers the information necessary for a decision by the Board and prepares a written memorandum which accompanies the party's submissions to the Board. All facts are submitted in writing, and the parties are not permitted to appear. If the issue involves either the quality or defect of an item, it may be inspected by the Board members or sent to an expert for laboratory examination or other tests.

Decisions of the Board are in writing and are public, but there is no official reporting system. Approximately six months after the recommendation has been given, the National Board for Consumer Policies will attempt to determine whether the merchant has acted in accordance with the recommendation. If not, the National Board attempts to persuade the merchant to follow its decision. If he refuses to do so, his name appears on the "blacklist." This list contains the names of all merchants which have not complied with PCB recommendations and is published by the National Board and by some newspapers.

In 1975, approximately 20,000 calls for assistance were made to the PCBs and 6000 written complaints were filed. The average rates for full and partial compliance were 81 per cent and 3 per cent respectively. Some business organizations, notably the Association of Motor Dealers, have undertaken to guarantee compliance by their members with all recommendations of the PCB. That association has also worked with the Consumer Ombudsman in drawing up standard contract terms concerning the sale and repair of automobiles. One of the terms states that if there is a dispute, the parties agree to go to the PCBs for settlement.

To the average consumer, the PCBs represent great savings in both time and money. There are no costs involved, and, since no appearance is necessary, there is no loss of wages. The help provided by the secretariat enables the consumer to proceed without any formal advice or a lawyer. The trade associations and their members also see a great deal of merit in the system. Since negotiation enables them to retain a greater degree of flexibility than would be the case if they were in court. The associations play a major role on the Board, and consequently, they tend to feel they are being treated fairly. Most important, they have an opportunity to participate in the development of legal norms. In other words, the trade associations have a stake in the venture and play a part in the success of the PCBs. This, plus the desire to avoid unfavorable publicity, probably accounts for the high compliance rates.

The major criticism of the PCBs is directed at their procedures and delays. While a completely written procedure saves money, it may oversimplify some issues. Furthermore, there is no way of giving oral proof. Also, paper work is time-consuming, and some argue that the secretariat tends to become bureaucratized.

Complementing the PCBs is the small claims court, which was completely overhauled in 1972 to make it more available, quicker, and less costly. Its simple procedure aims to reduce costs and discourage the use of lawyers. Usually the merchant is the plaintiff, and many of the cases are summary collection matters.

The clerk of the court, who must be legally trained, plays a key role. The statute mandates that he provide all types of assistance, from drawing up the necessary papers to trying to settle the case. If there is no settlement, the papers are prepared in such a way that only one hearing is usually necessary. The judge plays an active role in the courtroom;

he tries to reconcile the parties before judgment, and has the power to require the state to pay for such experts as he deems necessary. The court can also obtain an opinion from the PCB. The losing party may appeal only if the court of appeal or the supreme court permits.

Statistics bear out the fact that small claims courts provide a quick method of dealing with consumer controversies: 49 per cent are resolved without a hearing and an additional 47 per cent after only one hearing. The average time spent in reaching a decision, even with a formal hearing, is about 2 months.

The Market Court is a special tribunal whose primary purpose is to determine whether contract terms are reasonable and whether misleading advertising has occurred. Its main function is to proscribe future misconduct. It has no power to handle disputes between individuals but can issue injunctions and/or fines. Cases are brought by the Consumer Ombudsman. The Market Court provides recourse where negotiations between organizations or between the Ombudsman and a trade association have broken down. It has 9 members: 3 lay members representing consumer interests, 3 delegates from business, one specialist in consumer problems, and the chairman and vice-chairman, who are judges. The Court is the first, final, and only place to adjudicate actions for an injunction in these areas.

The Consumer Ombudsman, a government appointee, is responsible for the monitoring of advertisements and the protection of consumers against unethical clauses appearing in printed contracts. If the Consumer Ombudsman discovers an improper marketing practice or unconscionable contract clause, he seeks to negotiate a resolution of the immediate problem as well as a permanent change for the future. If not successful, he brings action in

the Market Court. The Ombudsman does not represent individual consumers.

In sum, recognizing that ordinary courts have not been successful in resolving consumer disputes, the Swedish system relies on special bodies with less formal structures to do most of the work, a system which is simpler, quicker, and less costly. But it should be kept in mind that the Swedish consumer protection system relies on the willingness of private organizations to work with various official bodies. Private organizations not only support the procedures of the system but also stimulate a constant improvement in the substantive law of consumer protection. Consumer and government representatives have an opportunity to gain first-hand experience of actual consumer problems and to participate in the development of the law. Trade association leaders are also in a position to communicate to members of the business community the problems that come out of their constant exposure to consumer complaints.

Private Initiatives

In the United States examples of statutory diversion of disputes from courts to private mechanisms are found in the areas of automobile accidents and election campaigns. In New York State, arbitration can be used to handle personal injury cases involving uninsured motorists in a no-fault context. An uninsured motorist making an injury claim may, under certain circumstances, have to submit to arbitation. With no-fault, in the event that the driver's claim against his own company is for $500 or less, he has the option of using arbitration. Prior to arbitration, in both situations there is an informal conciliation procedure. Somewhat similarly, but under private auspices, the Fair

Campaign Practices Code provides for arbitration by a 3-member panel on the question of proper campaign practice. Since political campaigns generate many complaints and there is need for speedy resolution, arbitration generally works well in such cases.

These are limited examples, but they may serve as a basis for building private, voluntary informal dispute mechanisms that could result from industry sponsorship or from bargaining between large interests, either within or without a state-supported structure.

An example of business-sponsored informal diversion is to be found in the consumer complaint centers and arbitration procedures of the Better Business Bureau, which have been established to resolve consumer complaints against member merchants. The system is relatively new and has been used for only about 2300 complaints in the last 4-5 years. About 100 Better Business Bureaus offer the arbitration program. Interestingly, a recent consent order before the FTC stipulated that a furniture company agree to submit consumer disputes to arbitration under the New York Business Bureau's rules. In all programs, the service is free and is supported by the dues of local businesses. All members have to agree in advance to arbitration. Cases range from $5 to $10,000, and hearings are private and awards are kept confidential as an inducement to businessmen to participate. Membership has doubled in the last year.

A somewhat different but related business-oriented approach is the German Arbitration Bureau for the Motor Vehicle Trade, set up to handle claims between customers and automobile repair shops. The Bureau is composed of 5 persons representing the automobile clubs, the motor vehicle mechanics guild, and an appraisers association. Either the customer or the motor vehicle shop can ask for

arbitration, but both parties must agree, and there is no expense. The proceedings are oral, not open to the public, and the findings are binding on the parties in a subsequent lawsuit.

Informal diversion, arrived at by bargaining between interest groups, has an important potential for reducing conflict. Some of the recent actions by the Director-General of Fair Trading in England suggest an analogy and may provide some guidance. Under the Fair Trading Act of 1973, the Director-General is mandated to keep under review all commercial activities affecting consumers. He is also required to encourage trade associations to prepare codes of practice for the guidance of their members in order to safeguard and protect the interest of consumers. The codes can cover any aspect of the relationship between the trader and his customer, whether as a manufacturer or as a retailer.

Recently a few trade associations have adopted such codes, each supported by an independent system of arbitration to deal with disputes under the codes. One of these codes was adopted by the Association of Manufacturers of Domestic Electrical Appliances (AMDEA) after consultation with the Office of Fair Trading. The AMDEA Code provides that service jobs should be completed satisfactorily on the first visit, and that manufacturers should stock enough spare parts to maintain machines during the availability of a model and for a minimum period thereafter. If a dispute arises and conciliation fails, a customer may take his complaint to an independent arbitrator appointed from an approved panel, and the award is binding on both parties. If the customer loses, his maximum liability for costs is usually limited to about 10. This low figure is made possible by a subsidy from the trade association. The first year AMDEA had 722 com-

plaints for conciliation and only one case for arbitration.

Negotiating the codes was not simple, and a strong and effective trade association was essential in getting the cooperation of the firms in the industry. All of the members had to agree on the terms, there was give-and-take with consumer representatives, and finally some firms had to make changes to comply with the Code. AMDEA estimates that the conciliation service costs £10,000 a year to run. While the number of complaints is down, it is too early to make an overall judgment on the program. The sixty-eight provisions of the British motor industry code cover the following contingencies: They control the content of warranties or guarantees offered to the buyers of new cars; ban vague claims in advertisements; lay down guidelines for fuel consumption claims; prescribe information that should be given to the buyers of second-hand cars; detail what should appear in estimates, quotations, and invoices; prevent garages from disclaiming responsiblity for cars in their possession. There are other codes for the Association of British Travel Agents, the shoe trade, and laundering and dry cleaning services. Some 100 more codes are projected by the Office of Fair Trading.

The Office of Fair Trading is devising monitoring systems to see how codes work in practice. Each trade association keeps an analysis of the complaints it receives. The Office of Fair Trading also receives regular information from local consumer protection agencies and will sponsor independent research. A special research project is being undertaken on the conciliation and arbitration aspects of the codes.

While in the United Kingdom the Director-General of Fair Trading is a government official and bargains as such, there is no power to force trade associations or its members to enter into such agreements. What seems to be happen-

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ing, according to the Director-General, is that private associations of various industry groups believe it is in their interest to set up such a system. They like the idea of voluntary agreements and feel that such agreements can be changed as experience dictates, more easily than a legislative structure can be.

While the United States has no similar statutory scheme, there are large interest groups in this society that could effectively bargain with trade associations for similar codes. The process would require fairly equal bargaining, or lacking that, some process like the Swedish Consumer Protection System, where limited government action is used to set an appropriate balance. Besides standard-setting, bargaining between interested groups could lead to alternative informal systems for resolving disputes within the particular spheres that those groups can legitimately represent.

IV
A Foundation Program

To sum up: Our capacity as a people to resolve conflicts is under severe strain. Since there is strong evidence that the number and complexity of disputes will continue to increase, it is important for us to develop fairer and more efficient ways of handling them. Some experiments are under way, but most of them are on a small scale. While government, business, and private organizations have displayed interest in proposals for reform and experimentation, it is difficult to devise and launch appropriate ventures.

What is needed is a systematic approach that expands our understanding of the larger issues in conflict resolution and takes account of the links between problems in different segments of the adjudicative and administrative processes. For example, effective alternative third-party intervention may reduce the workload and presseres on courts and agencies as well as de-escalate conflicts. To the extent that there is reform in dispute-settling mechanisms at the administrative agency level, there could be fewer demands on the judiciary. To the extent that the judicial system is overloaded with litigation, it has fewer resources to supervise administrative systems and to focus on matters best handled by the judiciary. At the same time, courts influence conflict resolution in other parts of society. Judicial insistence on reform of agency procedure could lead to a reduction of conflicts in administrative systems, and if the procedures are observed, to the reduction of cases brought to reviewing courts. Also, judicial

clarification of substantive rules is often necessary to encourage private negotiation and settlement.

The Foundation program will work on the effectiveness and fairness of existing and proposed innovative conflict-resolution methods and will also seek to explore the link between the various methods. It is hoped that as the program proceeds, interconnections will become better understood, and more integrated approaches to conflict-resolution and regulation will begin to emerge. While the proposed program is broad, we believe it important not to narrow the focus until after the initial planning phase, when we should have a better sense of where we can most effectively operate.

The variety of interesting experiments under way outside the United States suggests that a comparative dimension in the Foundation's program in conflict resolution might be useful. Possible subjects for transnational comparison include regional compacts with broad legal rights and responsibilities, such as the European Court and the Commission on Human Rights, the European Economic Community and the Court at Luxembourg, and the European approaches to problems of administrative law and practice. Conversely, issues of federalism that are so much a part of the American legal system may be of interest to Europeans in understanding the implications of their own developing continental common law.

The program on conflict resolution and regulation will work toward three broad objectives: (1) strengthening the dispute-processing capacity of existing institutions; (2) finding better ways to handle disputes outside of those institutions, and (3) identifying system-wide changes designed to reduce conflicts or to make their handling more efficient. Working toward these objectives will require a wide assortment of experiments, proposals, and

ideas for new research. We shall choose projects that seem to have potential for transferability and perhaps wide application, and that may also have a systematic effect on the larger system within which they operate. Following are some illustrative ideas.

1. Strengthening Exisiting Systems

Many disputes cannot be avoided or diverted and must be dealt with by the established judicial or regulating institutions. Here the need is to explore and develop more efficient but fair methods.

The Foundation might look at the long-range needs and limitations of the adversary system. While litigation rates are rising rapidly and placing a heavy burden on courts, the social dynamics underlying the litigation explosion are not well understood. Nor is it clear whether we are dealing with a wave or a trend. We also know that courts have trouble handling certain types of disputes and that these disputes may be processed but not resolved. We are not certain whether these deficiencies stem from a basic incompatibility between certain kinds of problems and the adjudicative process, or whether we are dealing with defects that can be corrected relatively easily.

The changing nature of legal rights and entitlements might also be examined—how these changes affect the adversary system and how the system should be altered to reflect these changes. Better understanding is also needed of the costs of dispute resolution and of the ways courts handle complex social policy cases.

Studying the courts' use of ancillary bodies in complex cases, e.g., human rights committees, "special masters" (individuals appointed by judges to perform tasks in aid of the court) in desegregation cases, could lead to an explora-

tion of the advantages of using an independent institution to assist in the resolution of complicated sets of facts. For example, would there be merit in a fact-finding resource for environmental matters and other complex issues, such as the proposed Science Court, or an expanded use of court-appointed experts not only to investigate complex cases but also to act as mediators?

The Foundation might assist a local court system and bar association in experimenting with the use of economic incentives to settle cases already filed. The English "payment-into-court" procedure (page 29), under which the defendant offers a sum of money in settlement and sends it to the court is an example often cited, and some variation of it may be worth pursuing. Another program (page 31), the Stuttgart Model from West Germany, also appears to be an efficient way to dispose of cases. While it calls upon the judge and the parties to assume a much more active role in case settlement than is usually the situation here, it contains elements that hold promise for replication, particularly if applied to the pre-trial stage.

A new idea for a dispute resolution center in county courthouses has recently been suggested. It proposes that an office be set up to review all matters that come into court, that someone be entrusted with the responsibility of recommending a variety of alternatives to the parties (e.g. arbitration, conciliation); and that the state make these alternatives available in the same building. Given support from a local jurisdiction, the bar, and representative community groups, the Foundation could help support such a center. If successful, it could be replicated in other communities. An extension of this idea would be the Foundation's evaluation of proposals to relocate lower courts into neighborhoods and to develop alternative models of neighborhood justice centers.

Along with taking a close look at small claims courts, it may also be worth examining the experience of specialized courts dealing with housing (the Boston and New York Housing Courts) and family matters (the Los Angeles Conciliation Court) with a view to expanding or replicating them. Each of these courts uses techniques that vary from the traditional adjudicatory process.

The burgeoning attempt by some federal agencies to resort to informal rule-making in order to simplify subsequent quasi-judicial decisions seems particularly noteworthy. The agencies hope that their use of clear general rules governing a large number of cases will reduce the time and resources needed to resolve these cases individually. The questions that need to be answered are whether this approach is both efficient and fair and whether the experience is transferable at both the federal and state levels.

Rule-making experiments are only one aspect of the long history of study and experimentation designed to make the administrative process more efficient and at the same time preserve the procedural rights of interested parties. As noted earlier, there is renewed concern about the overlapping jurisdictions of agencies, the "over-judicialization" of the procedures, and the effectiveness of regulation. Interesting possibilities for examination include experiments with agency procedures, such as changes in oral presentation, cross-examination, and the rules of evidence in disputes over scientific questions. Other possibilities include the use of advisory panels and the procedures of the Federal Energy Office, which, by statute, are not bound by the Administrative Procedure Act.

As pressure for reductions in regulation increases, there may be a need to examine whether opportunities for fair citizen participation in the regulatory process are safe-

guarded as greater efficiency is sought. For example, in a proposal to deregulate the licensing requirements of the broadcast industry, citizen groups pointed out that there should be funds to support monitoring of the station in order to provide checks on the broadcasters.

Some work is being done on the use of incentives and disclosure of information in place of regulatory standards. These suggestions generally apply to pollution control and occupational hazards, although in theory they may be applicable to a wide range of activity. To what extent, and for what reasons, would incentives or improved information, rather than regulation, suit manufacturers and employers, consumers, and employees?

State departments of welfare are experimenting with various forms of administrative rules to strike a balance between efficient management and client protection. This experience could be evaluated in terms of effects as well as applicability to other areas that are now characterized by large amounts of discretion. Similarly, studies could be made of some aspects of the criminal justice system, particularly sentencing, prosecutorial discretion, and juvenile courts.

As noted earlier, judicial review of agencies is intimately bound up with larger questions of conflict resolution. The Foundation could look at evaluations of such new approaches as those being initiated by the District of Columbia U. S. Court of Appeals and the Australian Administrative Appeal Tribunal (page 35).

2. Finding Ways to Handle Disputes Outside the Formal System

Most proposals for handling disputes outside the formal system suggest the following alternatives: mediation and

arbitration as a substitute for adjudication; investigation to complement or replace the adversary process, or a variety of private initiatives.

One project might grow out of such efforts as the Los Angeles Superior Court's Attorneys' Special Arbitration Plan, a voluntary system for handling claims up to $7,500; and the Michigan mediation system, a three-person panel which attempts to settle tort cases. Each may have potential for wider application, both in subject area and location. It may be helpful to evaluate them to determine their cost-effectiveness, accessibility to the community, transferability, and capacity to resolve disputes efficiently and fairly.

Environmental mediation may have potential for broad application and institutionalization. Here, the key problems are the identification of the right kind of structure, the creation of conditions for further development, and the building of a cadre of capable mediators. Further demonstrations and analysis may yield the key to policies and programs that can be applied in other fields, such as education and housing.

The use of arbitration instead of litigation needs more intensive testing. It is known that arbitration reduces court congestion, but not how much more efficient and effective it is than litigation. In any case, if arbitration is to become more widely used, at least in non-commercial matters, some or all of the cost would have to be paid by the state. Otherwise it may still be cheaper for poor people, particularly in negligence cases, to go to court. A demonstration of cost-competitive arbitration in a non-commercial context with the appropriate support of state, court, and bar officials could answer some of these questions and provide a model for replication.

Another possibility is the use of conciliation or commu-

nity courts as a substitute for formal adjudication. Such courts are characterized by informality, limited jurisdiction, lay judges from the neighborhood, and free access. They tend to be non-coercive, attempting to persuade rather than to order the parties to resolve their disputes and to abide by the results. These courts have not been part of the American culture, and we do not know whether individuals living in highly mobile and rapidly-changing neighborhoods, in which they have neither long-range status nor stakes, will voluntarily comply with informal community decisions.

The Public Offices for Legal Information and Conciliation in Hamburg, Germany (ÖRA) may provide some helpful clues for systematizing and spreading a kind of *pro bono publico* legal work that is not usually found in the United States (page 48). The ÖRA draws upon volunteers (judges, lawyers, civil servants, and others) to provide legal advice, conciliation, and arbitration for the poor and the middle class. Because the system is inexpensive, speedy, and staffed with high-caliber personnel, it enjoys wide acceptance and use. Among questions that need answers preparatory to replication in the U.S. are: If judges did not volunteer, what other community resources would be available? What would the costs and gains be to different parties of the availability of this kind of conciliation or arbitration? Building on the Hamburg experience, it is also possible to foresee a dispute-settlement referral service which would modify and expand the traditional lawyer-referral services.

Variants of investigative adjudication used in many European countries are getting increasing attention from commentators in the United States. One of the most interesting examples is the Swedish consumer complaint system (see page 52), which combines investigation, medi-

ation, and streamlined adjudication to resolve compcaints efficiently. Cases not settled to the parties' satisfaction are referred to small claims court. A Foundation planning grant could encourage a few local or state authorities to experiment with this approach.

The time may have come to reexamine the ombudsman notion. One potential new source of disputes is the number of recent Supreme Court cases that have applied due process rights to school discipline situations. This change could create serious problems for school administrators, yet may still not give students effective protection against arbitrary use of disciplinary powers. What needs to be examined is whether an ombudsman system would be effective in this and other fields, such as hospitals, nursing homes, and prisons?

There is some experience with investigator-mediators in welfare hearings. Demonstration projects could evaluate the effectiveness of these approaches in protecting the rights of clients while processing disputes more efficiently and satisfactorily.

Private initiatives may hold great promise in this area. Arbitration of consumer complaints by the Better Business Bureau is a relatively new example. About 2,300 complaints have been handled by the 100 Better Business Bureaus' arbitration projects in the last few years. One of the most prominent is Seattle's program, which uses unpaid volunteer arbitrators and provides services free. The program is supported by the dues of local businesses, and all members agree to be bound by arbitration. It may be useful to find out how many consumers use the system, whether they are satisfied, and whether the technique can be used in connection with other services, such as automobile repair. For example, through a trade association, repair shops could agree to a panel of arbitration composed

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of consumers and experts, which would handle all disputed claims.

Tensions associated with the adversary process in rulemaking under the Occupational Safety and Health Act have been a source of concern, and ways should be sought to reduce them. An analysis of alternatives to detailed standards as well as investigating the alternative of negotiated standards could help. Other work could explore the use of bargaining between interested groups to establish informal systems for resolving disputes. For example, a trade association could bargain with a number of consumer groups and agree that it would follow certain standards with respect to its products as well as a system of arbitration or mediation for disputes arising under the standards. The goal would be a voluntary system that would be both quick and informal. A similar plan is under way in Great Britain, where the Director-General of Fair Trade is responsible for encouraging trade associations to prepare codes of practice to protect the consumer.

In making more use of private means for handling disputes, serious questions are raised about the responsibilities of the private group. To whom is it accountable? How can private dispute handling avoid bias? There may be a need to study how government and private organizations, such as the American Arbitration Association, can enhance self-regulatory capacity. The role of the courts in monitoring and overseeing private sector activities may also warrant examination. If the private sector does take on increased responsibilities in dispute processing, there will be a shift in the role of the courts. This raises questions about standards for review, the applicability of constitutional principles of procedure, and more general questions of the capacity of the courts to respond to and facilitate this development.

3. Systemic Reforms

Simplification and standardization may have a great potential for avoiding disputes and making their resolution easier and less costly. However, legal simplification tends to lead to wholesale justice, under which the universality of a rule may preclude fairness in an individual case. Balance is important. For example, building on the experiences of no-fault automobile insurance, there are proposals for simplified divorce and simplified child adoption, and the substitution of workmen's compensation principles for common law tort rights in product liability cases. It is worth examining whether equity and sensitivity to individual needs are possible under such generalized procedures.

Probably the most radical attempt at simplification is the New Zealand no-fault liability scheme (page 22). This has been in operation for a few years and may be ripe for analysis. It presents a host of issues, including whether accidents should be defined to include illness, or at least job-related illness; the extent to which problems stemming from medical malpractice should be included; the adequacy of internal grievance systems when lawsuits are prohibited, and comparative costs. While any such reform is probably a long way off in the United States, the study of this plan may be helpful in understanding some less extensive reforms.

Traditional ways of resolving conflicts in the courts and administrative agencies are well entrenched. Even with persuasive demonstrations, it will take time to change the attitudes of professionals, citizens who use the present system, and professional organizations. Research, experi-

ments, and demonstrations of new approaches will have to show significant advantages if they are to make an impact on these groups, and people will have to have confidence in the new ways of resolving conflicts if they are to be used. The Foundation hopes to make a contribution by supporting work that validates and illuminates this promising but difficult field.

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